In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-712

JOHN PAUL JONES AND RUTH J. RUBEL JONES, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is unofficially reported at 72-2 U.S.T.C., par. 9636. The district court's opinion and order (Pet. App. A29-A36) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 1972. (Pet. App. A1.) A petition for rehearing was denied on September 22, 1972. (Pet. App. A21.) The petition for a writ of certiorari was filed on November 10, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly applied the doctrine of collateral estoppel in holding that the prior judgment on the 1956 and 1957 tax years bars petitioners from relitigating identical issues in this case with respect to subsequent tax years.

STATUTES INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 61. GROSS INCOME DEFINED.

(a) *General Definition.*—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;

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SEC. 1222. OTHER TERMS RELATING TO CAPITAL GAINS AND LOSSES.

For purposes of this subtitle—

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(3) *Long-term capital gain.*—The term "long-term capital gain" means gain from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such gain is taken into account in computing gross income.

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STATEMENT

Prior to 1953, petitioner [1] was the owner of an insurance agency which specialized in accident and health insurance coverage underwritten by Continental Casualty Company (Continental). In 1953, petitioner commenced negotiations with Forrest T. Jones (Forrest) (no relation to petitioner) for the sale of her insurance business. Continental apparently played an important role in the negotiations and loaned Forrest the necessary funds for the purchase. The agency was incorporated in furtherance of the sale plans and subsequently petitioner entered into an agreement to sell all of her stock in the agency to Forrest for the sum of $50,000. (Pet. App. A3-A4.)

Contemporaneously with the agreement of sale, petitioner entered into a so-called "five per cent agreement" with Continental. Under the terms of this agreement, petitioner agreed for a period of ten years "to represent, act and serve as a consultant for Continental on matters relating to the soliciting, negotiating, underwriting and placing of Teachers' Group Insurance as shall be requested by Continental." Continental, in turn, agreed to pay petitioner "for said services a sum equal to 5% of the premiums on any insurance written through Continental by Forrest T. Jones or the Ruth J. Rubel Agency, Inc." Forrest and petitioner also entered into a guaranty agreement, whereby Forrest guaranteed to petitioner that the payments received by her under the five-percent agreement

[1] Ruth J. Rubel Jones and John Paul Jones filed joint federal income tax returns for the years involved in this case. "Petitioner" refers to Ruth Jones.

would not be less than $15,000 per year, and that in the event the payments did not equal that amount in any three consecutive years, petitioner would have an option to purchase all of the capital stock of the agency for the sum of $1. (Pet. App. A4.)

These contractual arrangements gave rise to two separate tax refund actions. The first action involved the years 1956 and 1957 and, after trial on the merits, the issue submitted to the jury was whether, as contended by petitioner, the amounts received from Continental pursuant to the terms of the five-percent agreement were part of the sale price of the insurance agency taxable as capital gains or, as contended by the government, compensation for services rendered taxable as ordinary income. (Pet. App. A5.) The jury returned a verdict for the government. The present action involves the same contractual arrangements and payment provisions and the same issue but with respect to different tax years, 1958 through 1961. (Pet. App. A5-A6.) Based on the first judgment, the government moved for summary judgment on the ground of collateral estoppel. After denial of the government's motion (Pet. App. A29-A36), petitioner presented the same contentions to the jury in substantially the same manner as they had been presented in the prior case (Pet. App. A6). Additional evidence introduced in the present case that was either not fully developed or excluded in the trial of the first action included evidence that although petitioner had rendered services to Forrest in the years 1956 and 1957, she terminated these services in 1958. (Pet. App. A6, n.2.) The new evidence also included certain interoffice correspondence of Continental which allegedly

indicated that the five-percent payments were made from funds that belonged to Forrest rather than to Continental (Pet. App. A8), and petitioner's testimony that the value of the insurance agency at the time of sale was substantially in excess of the $50,000 price stated in the sales contract (Pet. App. A8). The case was submitted to the jury, over the government's objection, on the same issue presented in the first case, *i.e.*, whether the payments received by petitioner pursuant to the five-percent agreement were part of the sales price of the agency or whether they were compensation for services rendered. (Pet. App. A2, A6.) The jury again found for the government. (Pet. App. A5-A6.) The court of appeals affirmed the judgment of the district court on the ground of collateral estoppel. (Pet. App. A1-A9.)

ARGUMENT

The decision below is correct. There is no conflict or other reason for further review.

Under the doctrine of collateral estoppel, where there has been an adjudication between the same parties on the same issues, the parties are forever barred from relitigating that issue. The doctrine, which is designed to prevent repetitious lawsuits over matters which have once been decided, is applicable in federal tax cases involving liability for different years "where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged." *Commissioner* v. *Sunnen*, 333 U.S. 591, 599-600. See also *Tait* v. *Western Md. Ry. Co.*, 289 U.S. 620.

The present claim is between the same parties, arises from the same contractual agreement, involves the same type of contractual payments and, except for different taxable years, involves the same factual issue. The applicable tax laws remained unchanged. The sole issue is whether the operative facts of the present case are substantially unchanged from those of the first case. The court of appeals' affirmative finding on this issue does not warrant review by this Court.

Petitioner contends (Pet. 9-13) that the facts in the instant case are sufficiently dissimilar to those in the prior action to cause the doctrine of collateral estoppel to be inapplicable. Petitioner cites evidence to the effect that she rendered no services to Forrest during the tax years involved in the instant case, whereas she actively participated in the business of the agency during the years involved in the first case. (R. 338.[2]) She also relies on her testimony that the true value of the insurance agency at the time of sale was in excess of the $50,000 contract price (R. 324), and certain interoffice correspondence of Continental which allegedly shows that the payments received were made from funds belonging to Forrest rather than to Continental (Pet. App. A64-A68). None of this evidence, however, constitutes a change in the controlling facts. Petitioner's testimony that she ceased performing services under the consulting agreement in 1958 was before the jury in the prior trial (Pet. App. A6); in any event, this

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[2] "R." references are to the separately bound record appendix prepared for use in the court of appeals. "Ex. Vol." references are to the separately bound volume of exhibits used in the court of appeals.

evidence is irrelevant to the legal issue common to both cases and conclusively adjudicated in the first case, which was the taxable character of the payments received by petitioner pursuant to the terms of the five-percent agreement. That agreement required that petitioner serve as a consultant to the agency for a period of two years from 1953. (Ex. Vol. 13-14.) Having admittedly satisfied that requirement, petitioner was therefore, under the terms of the agreement, entitled to payment for the remainder of the ten-year period regardless of whether she performed any additional services to Forrest or Continental. Since there was no requirement that taxpayer actually perform additional services under the contract, the question whether she did or did not so perform is of no consequence with respect to the taxable character of the agreements, the terms of which remained unchanged.

Nor does petitioner's testimony as to the value of the insurance agency at the time of sale or the interoffice correspondence, evidence which was offered and could have been admitted at the first trial if properly submitted (Pet. App. A8), constitute a change in the operative facts or controlling circumstances, for this evidence was available at the first trial. See *Tait* v. *Western Md. Ry. Co., supra; Fairmont Aluminum Co.* v. *Commissioner*, 222 F. 2d 622, 627 (C.A. 4); *Jones* v. *Trapp*, 186 F. 2d 951, 953-954 (C.A. 10). The mere possibility of success given a second chance at producing evidence is not, in the absence of a change in the controlling law or facts, sufficient to overcome the bar of collateral estoppel. *James Talcott, Inc.* v. *Allahabad Bank, Ltd.*, 444 F. 2d 451, 463 (C.A. 5).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1972.

☆ U.S. Government Printing Office: 1972—491-494/387